Supreme Court, U.S.
FILED

(1) 02 853 DEC 2 2002

No. _____
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In The

Supreme Court of the United States

THOMAS CACCIOLA, et ux., et al.,

Petitioners,

v.

SIMS COMMUNICATIONS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, State Of Washington, Division I

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

1. Does the Washington Supreme Court's order of September 4, 2002, constitute a final judgment under 28 U.S.C. § 1257, where petitioners have no functional defenses to entry of a substantial judgment in the absence of their federal claims that *in personam* jurisdiction may be exercised over a Washington qualified foreign corporation whose rich contacts with the forum are constitutionally sufficient to satisfy the Due Process Clause of the Fourteenth Amendment, and where the state courts have finally adjudicated the issues of *in personam* jurisdiction and under the Securities Act of 1933, as it relates to the dismissal of these claims.

2. Whether Washington constitutionally may exercise *in personam* jurisdiction under the Due Process Clause of the Fourteenth Amendment over a Delaware corporation that was doing business in Washington for a year-and-a-half, was registered to transact business in the state, maintained a registered agent in the forum for service of process, and was subject under an agreement with petitioners to a choice-of-forum provision in Washington.

3. Whether the capricious dismissal of the Securities Act of 1933 as a theory of relief in this case, and the present inability of petitioners to assert their claims under Rule 144 because of the dismissal of the 1933 Act by the state courts, has deprived petitioners of due process of law guaranteed by the Fourteenth Amendment.

PARTIES TO PROCEEDINGS

The following list identifies all parties to the proceedings in the Washington Supreme Court:

Thomas Cacciola & Marlene Cacciola

Peter Vetrano & Lena Vetrano

SIMS Communications, Inc., James Caprio, Melvin Leiner, Darren M. Marks

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PETITION FOR A WRIT OF CERTIORARI

The petitioners hereby respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals, State of Washington, Division I.

OPINIONS BELOW

The December 17, 2001, judgment of the Court of Appeals of the State of Washington is unreported and is reproduced in the appendix. (App., *infra,* pp. 1a-15a).

JURISDICTION

The judgment of the Supreme Court of Washington was entered on September 4, 2002. (App., *infra,* 18a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the U.S. Constitution:

> "No State . . . shall deprive any person of life, liberty, or property, without due process of law * * * ."

28 U.S.C. Section 1257(a):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States."

STATEMENT OF THE CASE

Introduction. This case arises out of earlier proceedings between the petitioners and Kochcapital, Inc., a former securities broker-dealer, other parties, and Melvin

Leiner, James Caprio, and Darren Marks. In September 1995, the latter parties settled with the plaintiffs in a settlement agreement for cash and stock in SIMS Communications, Inc. On October 26, 1995, SIMS issued 55,554 shares of stock to Thomas Cacciola and Peter Vetrano under the agreement.[1] The certificates are signed by Mel Leiner as President and by James Caprio as Secretary of the corporation. The certificates have a restrictive legend as defined in Rule 144 and may not be sold prior to February 10, 1997. (R. 532, 295, 300, 308).

At the time of the agreement, SIMS was selling its securities on the NASDAQ National Market System, and its stock was published in the Wall Street Journal. (R. 321). Approximately six months later (March 1996), SIMS effected a 10 for 1 reverse split of its common stock. (R. 495, 507, 512). In May 1997, petitioners discovered that their shares had been reduced to 2,777 shares each through the reverse split in March 1996. (R. 298, 306). In February 1998, SIMS again split its stock in a 4 for 1 reverse split of the company's stock. (R. 527). They discovered the second reverse split of their stock eight or nine months later. (R. 299, 306-07).

Current Action. This case was filed in September 1997. A few months later, SIMS filed motions to dismiss the complaint, primarily arguing that it is not subject to jurisdiction in Washington, has never transacted business

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[1] The agreement defines corporation to mean SIMS Communications in which the defendants are "employees, officers and/or directors," and a default thereunder occurs by any failure of SIMS to pay the fair market value of the securities subject to the holding period under Rule 144. The agreement also provides, "The parties each represent and warrant that they have legal capacity and actual authority to enter into this [a]greement and to carry out all actions required of them by this [a]greement." In addition, Washington law and jurisdiction in King County, Washington govern the agreement, and there is a provision for attorney fees and costs to the party(ies) who substantially prevail in proceedings arising out of the agreement. (R. 310-13).

in the state, and does not have minimum contacts with Washington state. (R. 31 & 33-34). In January 1998, a motion continuing the motion to dismiss, based on pending discovery, was granted. (R. 51-52). A briefing of the issues demonstrated that jurisdiction over SIMS existed in this case.[2] (R. 62-66).

Discovery established that SIMS was doing business in Washington between January 1995 and May 1996 under a Certificate of Authority, and was conducting business and rental cellular telephone operations by automated dispensing machines at Alamo Rent-A-Car locations in this 17-month period. (R. 425, 483). Documents produced included a SIMS prospectus showing that it was doing business nationally (R. 386), and financial statements relating that its operations were generating seven figure revenues across the country. (R. 357).

In October 1998, the depositions of SIMS CR 30(b)(6) designate, James Caprio, Mel Leiner and Darren Marks were taken in Florida. From the depositions, it became clear that the stock issued under the agreement could not be traced to a prior owner (R. 942-958, 960-978, 990-1001), and that the shares originated from SIMS, as opposed to shares owned or controlled by them. (R. 1027-28).

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[2] See, *e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The briefings in essence argued that the forum clause in the agreement establishes consent to jurisdiction in Washington, and is prima facie valid and enforceable. The same result is reached under state law. The stock certificates that were signed by the President and Secretary of SIMS, on behalf of SIMS, and the issuance of stock as required by the agreement collectively constitute an agreement or contract between SIMS, the defendants and the plaintiffs. See *Parker v. BankAmerica Corp.*, 50 F.3d 757, 763 (9th Cir. 1995). Additionally, an agency relationship is material to the jurisdictional issue, and will subject a non-resident entity like SIMS to *in personam* jurisdiction in Washington state. See *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405-07 (9th Cir. 1994).

In November 1998, a second amended complaint was filed in essence alleging that as of September 1995, SIMS was incurring substantial losses, and had losses from its formation in 1991 (as of 9/94, losses of $4,867,000, and as of 9/95, $2 million in additional losses). It is alleged that these facts were not disclosed at the time of the agreement, and violate the Washington Securities Act. The complaint also alleges that their shares were issued in violation of Rule 144, 17 C.F.R. § 230.144, and that they were not given notice of the reverse splits of their stock. (R. 344, 373, 284-85, 297).

In December 1998, a second motion for summary judgment was denied. (R. 560-61). In June 1999, a third motion for summary judgment was filed, and in this time frame, plaintiffs filed a motion for partial summary judgment under Rule 144. (R. 1255, 830). On a hotly disputed record, the former motion was granted in August 1999. The order dismissed the complaint for failure to raise an issue of fact in support of the claims, and dismissed the complaint against SIMS for lack of personal jurisdiction. (R. 1124). Re-notes of the motion for partial summary judgment were filed in September. (R. 1127, 1179). In October 1999, a motion for attorney fees and costs was granted in the defendants' favor for $47,865.90. (R. 1183). A motion for reconsideration was denied. The order states that the partial summary judgment motion was mooted by the grant of summary judgment. (R. 1597).

Decisions on Appeal. In November 1999, an appeal was timely filed from these orders. During the appeal, a supersedeas bond was set for $75,000 staying enforcement of the judgment and covering the respondents' attorney fees in the appeal. In November 2001, oral argument was presented, and on December 17, 2001, the Court of Appeals issued a decision affirming the dismissal of SIMS for lack of jurisdiction, reversing the dismissal of the claims under the Washington Securities Act, and dismissing the claims under the Securities Act of 1933, and associated, but separate, claims under state law.

The affirmance for lack of personal jurisdiction delicately speaks to the activities of SIMS Communications in Washington for 17 months through its business and rental cellular telephone operations at Alamo Rent-A-Car outlets from January 1995 to May 1996, and its revenues in this period ($12,000), but planing from its decision *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408 (1984), states that these contacts are insufficient to support general jurisdiction in this case. The decision discerns that specific jurisdiction is also lacking because SIMS was not a party to the agreement and, making no mention of the *Burger King, Bremen, Carnival Cruise Lines* or of the *Parker* and *Chan* cases, states that it is not subject to the agreement's forum clause. (App., pp. 3a-6a).

The decision affirming the dismissal of petitioners' claims under the 1933 Act is based on *Litho Color, Inc. v. Pac. Employers Ins. Co.,* 98 Wn. App. 286, 991 P.2d 638 (1999), and the absence of argument on the claims. (App., pp. 8a-9a, 14a). These claims are based on Rule 144, and were extensively briefed in the appeal. (9/20/02 Motion for Reconsideration, pg. 9, and Appendix C to Motion).

The constitutional arguments before the Washington Supreme Court for the assertion of *in personam* jurisdiction are in essence that SIMS contacts with Washington state are inarguably sufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment under principles of general jurisdiction, *Helicopteros,* 466 U.S., at 414-18, and specific jurisdiction. *Burger King,* 471 U.S., at 472-82; *The Bremen,* 407 U.S. at 10-15. (Petition for Review, pgs. 13-19).

The constitutional arguments as they concern the Securities Act of 1933 are intrinsically based on the dismissal of these claims contrary to due process considerations and the holdings in *Bell v. Burson,* 402 U.S. 535 (1971), *Richards v. Jefferson County,* 517 U.S. 793 (1996), *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), and *Boddie v. Connecticut,* 401 U.S. 371 (1971). (9/20/02 Motion for Reconsideration, pgs. 9-10; Petition for Review,

pg. 20). It was in essence argued that this important claim had been dismissed, when argument was presented on these issues, and that the claims under Rule 144 could not be asserted as they stood in the appeal because of the dismissal of the 1933 Act by the state courts.

On September 4, 2002, the Washington Supreme Court, comprising a majority of five of the nine Justices of the Court, dismissed the appeal. (App., 17a).

REASONS FOR GRANTING THE PETITION

Section I of this petition for certiorari explains that this Court has jurisdiction to review the judgment of the Washington Court of Appeals under 28 U.S.C. § 1257(a), consistent with the standards in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). Section II of this petition explains that general jurisdiction in this case is present under the principles of this Court's decision in *Helicopteros*, and may more firmly be based on consent under the holdings in *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952), and *Neirbo v. Bethlehem Corp.,* 308 U.S. 165 (1939). This section discusses the importance of the due process issues in these settings, and the conflict between the decisions of the state courts that *in personam* jurisdiction may not be exercised over a foreign corporation with rich connections with the forum state, and the reasoning of this Court's decisions and the decisions of other federal and state courts. Section II also discusses the importance of the due process issues in a specific jurisdictional setting, and the conflict between the decisions below and the rationale of the Court's decisions in the *Carnival Cruise Lines*, *Burger King*, and *The Bremen* cases.

Section III discusses the conflict between the decisions of the state courts dismissing petitioners' claims under the Securities Act of 1933 and the due process decisions of this Court in *Bell v. Burson, Richards v. Jefferson County, Logan v. Zimmerman Brush Co.,* and *Boddie v. Connecticut.*

I.

THE DECISION OF THE WASHINGTON COURT OF APPEALS IS REVIEWABLE BY THIS COURT PURSUANT TO 28 U.S.C. § 1257(a), UNDER THIS COURT'S DECISION IN *COX BROADCASTING CORP. v. COHN*, 420 U.S. 469 (1975)

The appellate jurisdiction of this Court has been invoked by the petitioners pursuant to 28 U.S.C. § 1257(a). The statute requires that the judgment for which review is sought be final. *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976). This has historically been expressed by the Court to mean that finality is not normally satisfied if the state courts must conduct further substantive proceedings before the federal issues are resolved. *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987); *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

In a classically older case with roots in a number of recent cases, the Court observed that the finality doctrine "as a legal concept . . . has a penumbral area." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). The Court also recognized that the rule has not been applied mechanically and that there are circumstances in which there has been "a departure from [the] requirement of finality for federal appellate jurisdiction." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). In *Cox*, the Court stated that there are at least four categories of cases where it has found jurisdiction to be appropriate in the presence of further proceedings in the state courts. In the first category are cases where "the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." In the third category, are cases "where the federal claim has been finally decided,

with further proceedings . . . in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S., at 479-81.

Mills v. Alabama, 384 U.S. 214 (1966), and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) are examples of cases in the first category. In *Mills,* a claim under the First Amendment to a statute proscribing the publication of editorial promotion on an election day was frustrated by the Alabama courts, thus nullifying the defense in a trial that "would be no more than a few formal gestures leading inexorably towards a conviction," 384 U.S., at 217. In *Austin,* the Illinois Courts had affirmed a temporary injunction for distributing literature on respondent's real estate practices, and this Court found that a permanent injunction on termination of the proceedings would "be little more than a formality." 402 U.S., at 418. This case is practically no different. As in *Mills* and *Austin,* the petitioners have no defenses to entry of an order like the judgment entered in October 1999, which is a formality in the absence of their federal claims that personal jurisdiction over SIMS is constitutionally present under the Fourteenth Amendment.[3]

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[3] The Court of Appeals held that SIMS was not a party to the agreement and therefore not subject to the forum clause (App. 6a), but it clearly is a party to the agreement under its express provisions. See *infra,* pp. 22-23. The basis of the liability is RCW 4.28.185(5), which authorizes an award of attorneys' fees to a non-resident defendant who prevails in the action. *Voicelink Data v. Datapulse,* 86 Wn. App. 613, 627, 937 P.2d 1158 (1997); *Hewitt v. Hewitt,* 78 Wn. App. 447, 456-57, 896 P.2d 1312 (1995). This is the statutory basis for including SIMS in the underlying judgment. Because the federal issue as it concerns jurisdiction is conclusive, the outcome of the liability is predetermined.

Moreover, as more recently explained in *Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989), the state courts have finally adjudicated the issues of jurisdiction and under the 1933 Act, "and so has left 'the outcome of further proceedings preordained.'" *Id.,* at 306. These issues were decided on the merits by the state courts, review was denied by the highest state court, and motions for reconsideration were filed in both courts, such that there can be no trial with SIMS or on these issues, but rather, the dormant possibility of another appeal in the state courts for them to formally repeat the last word on what has already been stated. The Court has treated state-court judgments as final in these cases because the results of this refracted process are inexcusable delay and "a completely unnecessary waste of time and energy in judicial systems. . . ." *Mills,* 384 U.S., at 217-18.

Also, of related importance, as in *Austin,* but unlike *Florida v. Thomas,* 532 U.S. 774 (2001), there is no evidence that the dismissals for lack of personal jurisdiction and of the 1933 Act claims rest on a disputed question of fact, *Austin,* 404 U.S., at 418, or that further fact-finding is necessary in the remand. *Thomas,* 532 U.S., at 778. The state-court judgment is final on the federal issues, and quite analogously to *Cox,* if the final decision on the federal issues is incorrect, federal law forecloses further proceedings on a congruous judgment in the state courts, but if the decision is correct, the litigation will terminate in a decision by this Court on the merits.

This case also satisfies *Cox's* third exception for cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S., at 481. Resolution of the state-law claims in the remand would effectively moot the federal issues raised here. Significantly, as with the dismissed claims under the

1933 Act and Rule 144, the claims that have survived the remand under the Washington Securities Act have been similarly asserted in the same action with SIMS. In the state-court proceedings, the respondents maintain that they did not withhold material information from petitioners on the financial status of SIMS at the time of the settlement agreement, and if they prevail on this narrative of the facts, then the same claims involving SIMS will also fail because they will have established that they are not liable for petitioners' losses under state law. In this situation, the petitioners' claims will have been denied "on state law grounds, thus foreclosing the federal issue." See 420 U.S., at 482.

Alternatively, if petitioners prevail on the merits, they will have no basis to seek review and the federal issues will be mooted. See *Ritchie,* 480 U.S., at 48; *Cox Broadcasting Corp.,* 420 U.S., at 481. In this event, the ability of petitioners to obtain review of the federal issues (which have already been decided by the state courts) will depend on respondents' willingness to appeal. Should they appeal a jury's decision, the only method for preserving the federal issues is by cross-appeal, and the only way this Court will be able to reach the issues is if the respondents file a petition for certiorari (assuming a verdict is not reversed) and petitioners file a cross-petition. When a case is in this posture, the Court has considered it sufficiently final to justify review. See *Ritchie,* 480 U.S., at 48.

The decisions of the state courts on the issues of *in personam* jurisdiction and under the Securities Act of 1933 are unambiguously final under 28 U.S.C. § 1257(a). Also, considering that the litigation could be terminated by a decision on the federal issues, reaching the merits is consistent with the pragmatic approach the Court has followed in the past in determining finality.

II.

THE DECISION RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICTS WITH THE REASONING OF THIS COURT'S DECISIONS IN THE *HELICOPTEROS*, *PERKINS*, *NEIRBO*, *BURGER KING*, AND *BREMEN* CASES

A.

The exercise of personal jurisdiction by a state over a non-resident entity is constitutionally determined by the Due Process Clause of the Fourteenth Amendment. *Helicopteros*, 466 U.S., at 413-14. Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident entity that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 414, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Historically and in recent cases, the Court has melded its holding in *International Shoe* in specific and general jurisdictional settings. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Helicopteros*, 466 U.S., at 414-18.

In this time-resistant framework, the Court has held that general jurisdiction is determined by exploring whether the nature of the contacts with the forum state "constitute the kind of continuous and systematic general business contacts" the Court has found present where the activities in the forum are sufficient to support jurisdiction over cases unrelated to those activities. *Id.*, at 414-16.

Applying these principles to the contacts that SIMS Communications established in Washington, there is engulfing record evidence that the due process requirements of general jurisdiction were satisfied in this case. Summarizing the evidence below, SIMS was doing business in Washington between January 1995 and May 1996 with state approval, and was conducting its business and

rental cellular telephone operations by automated dispensing machines at Alamo Rent-A-Car locations in this year-and-a-half period.

It is undisputed that SIMS was transacting business in Washington pursuant to RCW 23B.15.030 of the Washington Business Corporations Act under a Certificate of Authority filed in December 1995. As a Delaware corporation, SIMS was authorized under state law, as a domestic corporation is authorized, to transact business in Washington, and by statute, had the same rights and privileges, and was subject to the same duties, restrictions, and liabilities as are imposed on a domestic corporation. RCW 23B.15.050(2).

Under its Certificate of Authority, SIMS consented to the appointment of a registered agent in Washington for service of process, and maintained a local address for mail and corporate license materials. (R. 485-86). SIMS also maintained a corporate account with the state (R. 489). As a registered corporation, SIMS was subject to state taxation and reporting requirements (R. 489), and was subject to state administrative actions for non-compliance with state law. The existence of legal obligations in the forum is a decisive factor under RCW 4.28.010(10) in determining whether general jurisdiction exists. *Crose v. Volkswagenwerk Aktiengesellschaft,* 88 Wn.2d 50, 54, 558 P.2d 764 (1977); *Raymond v. Robinson,* 104 Wn. App. 627, 633, 15 P.3d 697 (2001).

The physical presence maintained by SIMS in Washington is manifested by its business operations and dispensing machines which occupied part of the premises at Alamo rental car outlets in the state. It is clear that consideration passed by rental, lease or otherwise between SIMS and Alamo Rent-A-Car to conduct its business operations at Washington Alamo outlets. Their agreements, written or otherwise, gave rise to legal obligations between them and there is no doubt that a breach or a default by the parties in their agreements would have subjected them to legal obligations in Washington.

It is undisputed that SIMS conducted its business operations in Washington by credit card (R. 376), and that every resident credit card it charged between January 1995 and May 1996 (and it may be surmised that there were hundreds) gave rise to legal obligations in contract (and potentially tort) with Washington residents.

Despite the prolific nature of these substantial jurisdictional contacts, the decision nonetheless highlighted the activities of SIMS in Washington for 17 months through its business and rental cellular telephone operations at Alamo rental car outlets from January 1995 to May 1996, and its revenues in this period ($12,000), and held that although these facts place this case somewhere between the factual scenarios in *Raymond v. Robinson,* 104 Wn. App. 627, 15 P.3d 697 (2001), *Hartley v. American Bridge League,* 61 Wn. App. 600, 812 P.2d 109 (1991), and *Banton v. Opryland, U.S.A, Inc.,* 53 Wn. App. 409, 767 P.2d 584 (1989), these contacts are insufficient to support general jurisdiction in this case. (App., 6a). Significantly, these facts were decisively sufficient to withstand two motions for summary judgment, and no new facts were presented in the final summary judgment motion. Also, although these cases appear to establish the basis of the jurisdictional inquiry, the present case is more of a prismed application of *Perkins,* though in a different context, than it is of the cases on which the decision is based.

This case is like *Perkins* because there, as here, a foreign corporation carried on in the forum state "a continuous and systematic, but limited part, of its general business." 342 U.S., at 438. In *Perkins,* petitioner filed actions in Ohio against a mining company seeking dividends due as a stockholder, and damages because of the company's failure to issue her stock certificates. The company's mining properties were in the Philippines, but its operations were halted during the Japanese occupation. During that interim, the president maintained an office in Ohio from which he conducted company activities, kept company files and held directors meetings, distributed

salary checks to himself and to two secretaries drawn on Ohio bank accounts, used an Ohio bank as a transfer agent, and supervised policies dealing with its Philippine properties. *Id.*, at 447-48. This Court held that these activities in the forum in this interim period were continuous and systematic. *Id.*, at 448.

The contacts established by SIMS Communications in Washington are, on the one hand, comparably continuous to the business activities in *Perkins,* and on the other, may be more systematic than these activities. It is clear that SIMS was conducting business nationally in car rental agencies, airports, and hotels from Massachusetts and New Jersey, through the Midwest and the South, to Puerto Rico and Hawaii, to California at the time of the agreement, and was also conducting business operations in Washington in this period. As in *Perkins*, SIMS carried on a limited part of its general business in the forum state. It is unknown in *Perkins* the extent to which the activities in the forum were carried on in an everyday and uninterrupted or continuous manner, but it is quantitatively known in this case that these activities were being conducted in Washington on a consistent, uninterrupted and round-the-clock basis for a year-and-a-half. The "AC/DC" units employed by SIMS were operated as automated dispensing stations, and accepted funds through credit cards or electronic funds transfer. (R. 385-86).

The systematic nature of the contacts in *Perkins,* two state bank accounts and engaging a state bank to act as transfer agent, are comparably demonstrated by the credit card transactions and funds transfers from Washington Alamo rental car locations, the corporate accounts it maintained with the state, and by the state taxation and reporting requirements that SIMS was subject to in Washington. The qualitative character of affiliate contacts in *Perkins,* the directors meetings, correspondence relating to company business, and supervision of foreign properties in the forum, are important in the minimum contacts analysis, but may not be as substantial as the statutory

consent obtained by SIMS from Washington under its Certificate of Authority to transact business in the state, the registered agent it maintained in Washington for service of process, the address it maintained for mail and corporate license materials, the commercial agreements it had with Alamo Rent-A-Car to conduct its business operations at its Washington outlets, and the legal obligations it was subject to with state residents. As in *Perkins,* these activities have a character of continuity in them, but they are innately systematic because they define the continuity of the contacts in the forum.

Also, like *Perkins,* the contacts established by SIMS in Washington are more substantial than the activities in *Helicopteros,* where the contacts of Helicol, a Columbian corporation, were held to be insufficient to satisfy the requirements of due process. The Court based its holding on the grounds that a trip to Texas by its CEO to negotiate a contract was not a contact of a continuous or systematic nature, as *Perkins* and *International Shoe* described it; accepting checks into its New York bank drawn on a Texas bank were of negligible significance because "such unilateral activity . . . is not an appropriate consideration when determining whether a defendant has sufficient contacts . . . to justify the assertion of jurisdiction," citing *Kulko v. Superior Court,* 436 U.S. 84, 93 (1978); and under *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923), the purchases of equipment from Texas and sending personnel to Texas for training, standing alone, was not a sufficient basis for a State's assertion of jurisdiction. *Helicopteros,* 466 U.S., at 416-19. None of the activities in *Helicopteros* that were found to be unilateral or negligible are present in this case.

The decision appears to have arched the balance against the exercise of jurisdiction on the basis of the *Raymond, Hartley* and *Banton* cases, and because the appellants presented no evidence "that SIMS had offices, employees or agents in this state," but to the contrary, as this case bears out, the polar opposite is true on the latter

point. Moreover, except for *Hartley,* these cases are entirely inapposite.[4] In *Hartley,* the Court held that a bridge league was subject to general jurisdiction because it: organized bridge tournaments and sold and transported bridge supplies in the state, charged and collected fees from state residents, and determined which residents could participate in tournaments. 61 Wn. App., at 606.

The differences between these cases and this case are markedly clear. There is no mention in *Raymond* or *Banton* (as is the case here) that the parties had offices, maintained a physical business presence, a registered agent, or had statutory consent to do business in the state. These latter facts, a registered agent and statutory consent, are as well lacking in *Hartley*. It also cannot be said in these cases, as it can in the present case, and as it can in *Perkins* and *International Shoe,* that the parties over whom jurisdiction was sought maintained a continuous business presence in the forum, or that they conducted these activities on a regular basis in the state.

The federal questions on the seemingly clear presence of general jurisdiction in this case are substantial because

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[4] In *Raymond,* an Arizona company that installed RV accessories with no offices or agents in Washington advertised its products to Washington consumers through magazines and mailings, negotiated sales with state consumers over the phone and through the mail, authorized warranty repairs in Washington, and sent a technician to Washington to service the unit at issue. The court held that these contacts were not sufficient for the exercise of general jurisdiction. 104 Wn. App., at 633-36. In *Banton,* a Washington resident was injured while visiting the Grand Ole Opry in Tennessee, and had visited Opryland after going to a promotional presentation in Washington. The Court held that presentations to solicit persons to visit Opryland, occasional payment of commissions to travel agents, occasional broadcasts of music, and reservations affecting a few state residents did not suggest continuous involvement in Washington, and that these activities were insufficient to confer general jurisdiction. 53 Wn. App., at 417-18.

they involve applications and permutations of *Helicopteros, Perkins* and *International Shoe* in difficult and principally grey areas on which this Court has not definitively or recently spoken. On related grounds, the jurisdictional facts in this case go beyond the concise holdings in these cases because SIMS was registered in Washington under its Certificate of Authority to transact business in the state, and maintained a registered agent in Washington for service of process.

This Court has held in a number of cases that a foreign corporation which authorizes an agent for service of process in compliance with a state registration statute consents to the exercise of general personal jurisdiction in that state. *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 166, 174-75 (1939); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93, 95 (1917). In the latter case, the Court held that Missouri could constitutionally exercise general jurisdiction over a foreign corporation, and "not deprive the defendant of due process," even though its only apparent contact with Missouri was its designation of the Superintendent of Insurance as its registered agent in compliance with state law. *Ibid.*

The Court has not directly examined its holdings in the *Neirbo* and *Pennsylvania Fire Ins. Co.* cases since its decision in *International Shoe Co. v. Washington*; however, historical and more recent support for the recognition of consent through statutory registration as a basis for general jurisdiction is notably present in important cases that have been decided after *International Shoe.* In *Perkins,* for example, the Court reaffirmed the principle that there would have been no need to consider minimum contacts if consent had been given: "Today if an authorized representative of a foreign corporation be physically present in the state . . . and be there engaged in activities appropriate to accepting service . . . there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state. . . . " *Perkins,* 342 U.S., at 444.

Federal and state cases that have considered the due process basis for the holdings in *Neirbo* and *Pennsylvania Fire Ins. Co.* in light of *International Shoe* are divided on this issue.[5] Thus, a decision on this question goes significantly beyond a single Washington statute. It impacts the transacting business statutes of almost every state, and does so on a subject about which this Court has not recently spoken. Because the inquiry is far-reaching, a significant federal question is presented.

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[5] A number of federal and state courts have approved the rationale of these cases. See, *e.g.*, *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (Stewart, J., sitting by designation); *Bane v. Netlink, Inc.*, 925 F.2d 637, 640-41 (3d Cir. 1991); *Cowan v. Ford Motor Co.*, 694 F.2d 104, 105-06 (5th Cir. 1982), *question certified on reh'g*, 713 F.2d 100 (5th Cir.), *rev'd & action remanded*, 719 F.2d 785 (5th Cir. 1983); *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1395-96 (8th Cir. 1993); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 793 (10th Cir. 1979); *Crosfield Hastech, Inc. v. Harris Corp.*, 672 F.Supp. 580, 585 (D.N.H. 1987); *LaCorte Elec. Const. v. Centron Sec. Systems, Inc.*, 894 F. Supp. 80, 83 (N.D.N.Y. 1995); *Amalgamet, Inc. v. Ledoux & Co.*, 645 F.Supp. 248, 249 (S.D.N.Y. 1986); *Vogel v. Tenneco Oil Co.*, 276 F.Supp. 1008, 1012 (D.D.C. 1967); *Kyle v. Days Inn of America, Inc.*, 550 F.Supp. 368, 369 (M.D. Pa. 1982); *Fischman v. Fischman*, 470 F.Supp. 980, 982 (E.D. Pa. 1979); *Sternberg v. O'Neal*, 550 A.2d 1105, 1111 (Del. 1988); *Mittelstadt v. Rouzer*, 213 Neb. 178, 328 N.W.2d 467, 469 (1982); *White v. Pepsico, Inc.*, 568 So.2d 886, 889-90 (Fla. 1990); *Washington v. Superior Court*, 169 Wash. 688, 692-96, 15 P.2d 660 (1932). Other courts have rejected the rationale of these cases. See, *e.g.*, *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 89 (1st Cir. 1990); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566, 575 (2nd Cir.), *cert. denied*, 519 U.S. 1006 (1996); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-83 (5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *Western Helicopters v. Bell Helicopter Co.*, 929 F.Supp. 59, 63 (D. Puerto Rico 1996); *Goodyear Tire v. Ruby*, 312 Md. 413, 540 A.2d 482, 487 (Md. 1988); *Freeman v. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000); *Speck v. Mutual Serv. Life Ins. Co.*, 65 Ohio App.3d 812, 585 N.E.2d 509, 512 (1990); *Conner v. Conticarriers and Terminals*, 944 S.W.2d 405, 416 (Tex.Civ.App. 1997); *Washington Equip. v. Concrete Placing*, 85 Wn. App. 240, 246, 931 P.2d 170 (1997).

Considering, however, the lucent reasoning of the more recent decisions in *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695 (1st Cir. 1984), *Sondergard v. Miles, Inc.*, 985 F.2d 1389 (8th Cir. 1993), and *Sternberg v. O'Neal*, 550 A.2d 1105 (Del. 1988), and also considering this Court's incisive statement in *Perkins*, subsequent to *International Shoe*, reaffirming the principle that there is no unfairness in subjecting a corporation to the jurisdiction of the courts of a state in this consensual setting, there can be little doubt that SIMS has assented to the jurisdiction of Washington courts in this case.

B.

As explained in the previous section, personal jurisdiction is unequivocally measured by due process under the Fourteenth Amendment. This is also true in a specific jurisdictional setting, but the focus is measurably different. The cornerstones of specific jurisdiction under this Court's cases encompass three indispensable inquiries: whether an out-of-state corporation or non-resident individual "purposefully established 'minimum contacts' in the forum State," whether the cause of action "arises out of or relate[s] to" the activities with the forum, and whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76 (1985). This is also true under state law. *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311 (1972).

Minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109 (1987) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum. . . . " *Burger King*, 471 U.S., at 475.

The substantial connection between an out-of-state corporation and the forum necessary for a finding of minimum contacts comes about by an action of the entity purposefully directed toward the forum State. *Asahi Metal Industry,* 480 U.S., at 112. Even a single act can support jurisdiction if it creates a substantial connection with the forum. *Burger King,* 471 U.S., at 475 n.18. Jurisdiction "may not be avoided merely because the defendant did not *physically* enter the forum. . . . So long as a commercial actor's efforts are 'purposefully directed' toward . . . another State," this Court has "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.,* at 476.

In *Burger King,* the Court held that the assertion of personal jurisdiction in Florida over a Michigan resident, for the alleged breach of an agreement with Burger King, a Florida corporation, did not offend due process. In considering whether and to what extent a contract can constitute a contact for purposes of due process analysis, the Court observed, "The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, *International Shoe Co. v. Washington*. . . . Instead, we have emphasized the need for a 'highly realistic' approach that recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.'" 471 U.S., at 478-79.

The present case in a number of relevant aspects, as explained in more depth below, is like *Burger King* because here, as there, the parties entered a structured agreement with future consequences in the forum, and like *Burger King,* the agreement here has a choice-of-law provision providing that it is to be interpreted and enforced under the laws of Washington. Unlike *Burger King,* and more like *The Bremen* and *Carnival Cruise Lines* cases, the agreement has a forum clause providing for

jurisdiction in Washington, which solidifies the presence of specific jurisdiction in this case.

There can be little doubt that SIMS Communications purposefully availed itself of the Washington market. The record shows that it purposely delivered its products into the stream of Washington commerce with the result that its products were purchased by Washington consumers for a year-and-a-half, and that it benefited from the Washington market. These facts are more than sufficient to support the exercise of general jurisdiction, but they are immaterial as a basis for satisfying this requirement because the causes of action in this case do not arise from these facts. The more powerful ground that satisfies this element is the parties' agreement, and the execution by SIMS of the stock certificates transferred under the agreement.

The requirement of personal jurisdiction is based on due process and is a right that can be waived. *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 702-03 (1982). A negotiated agreement with a forum clause that shows consent to jurisdiction is enforceable unless it can be shown that enforcement would be unreasonable and unjust, or that it is invalid for fraud or overreaching. *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 10-15 (1972); *Kysar v. Lambert,* 76 Wn. App. 470, 484-85, 887 P.2d 431 (Div. II), *rev. denied,* 126 Wn.2d 1019 (1995). As previously noted, the agreement has a choice-of-forum provision in which jurisdiction is in the courts of Washington. The respondents did not show in the state court proceedings that the provision was invalid or unreasonable, that there is serious inconvenience of the contractual forum or that Washington is a "remote alien forum." The forum clause confirms consent by the individual respondents to jurisdiction in Washington, and is prima facie valid and enforceable. See *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 591-95 (1991); *Burger King,* 471 U.S., at 472 n.14; *The Bremen,* 407 U.S., at 10, 15; *Kysar,* 76 Wn. App., at 484-85.

SIMS did, however, argue that Washington does not have jurisdiction over it because it was not a party to the agreement and cannot be bound by its terms, nothing indicates that anyone signed anything on its behalf, and that it does not have sufficient minimum contacts for the exercise of jurisdiction in this case. (R. 31, 33-34). The record discredits these assertions, and to the contrary as argued by SIMS, its contentions overlook substantial record evidence that it clearly knew it was affiliating itself with an agreement having long-term consequences in Washington. *Burger King* admonishes courts to carefully consider prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' course of dealing, in evaluating whether a party purposefully established minimum contacts with the forum. 471 U.S., at 479.

The contract documents required the issuance of 50,000 shares of SIMS Communications stock, and explicitly state that a default under the agreement occurs by any failure of SIMS to pay the fair market value of the securities subject to the holding period of Rule 144. Also, the agreement defines corporation to mean "SIMS Communications ... in which Defendants are employees, officers and/or directors," and the stock certificates issued under the agreement were signed by the President and Secretary of SIMS.[6]

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[6] Whether the stock transferred under the agreement was issued by SIMS Communications or, as the respondents contended below, was owned and/or controlled by the individual respondents is immaterial because SIMS is liable for the obligation under the terms of the certificates. The certificates provide in pertinent part, "SIMS COMMUNICATIONS, INC., INCORPORATED UNDER THE LAWS OF ... DELAWARE, AUTHORIZED: 20,000,000 COMMON SHARES.... This Certifies that ... is the owner of ... Fully Paid and NonAssessable Common Stock ... of SIMS COMMUNICATIONS, INC. transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed. This

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The terms of the agreement confirm that SIMS became party to an agreement with future consequences and legal obligations in Washington. The parties' actual course of dealing substantiates that the execution of material documents required under the agreement by its President and Secretary were preceded by negotiations with their Florida counsel conducted by telephone and fax, (R. 1027-28), that the stock certificates delivered under the agreement were subject to a two-year holding period (Rule 144) pursuant to an agreement governed by Washington law, and that the agreement and the certificates were subject to three-year and six-year limitations periods of state law under RCW 4.16.080 (tort actions) and RCW 4.16.040 (contract actions). The sum of these actions and the legal obligations and consequences that SIMS was subject to in Washington through the execution and issuance of the securities and the default provisions under the terms of the agreement decisively reinforce its deliberate affiliation with the forum and the foreseeability of litigation there. Through the agreement, its conduct and specific connections with Washington confirm that it should reasonably anticipate being haled into court there. See *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). SIMS purposefully availed itself of the benefits and protections of Washington's laws by becoming obligated under an agreement providing that its forum and those laws would govern disputes, *Burger King,* 471 U.S., at 482, and has purposefully established contacts

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Certificate is not valid until countersigned by the Transfer Agent. IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed by the facsimile signatures of its duly authorized officers and to be sealed with the facsimile seal of the Corporation." The certificates are identical and equally state share ownership. Contrary to the respondents' arguments, however, the shares cannot be traced to a prior owner. See *infra,* pg. 28.

with Washington that create a substantial connection with the forum state. *Asahi Metal Industry,* 480 U.S., at 112.[7]

The decisions in the present case conflict with the rationales of the *Burger King, World-Wide Volkswagen, The Bremen,* and *Carnival Cruise Lines* cases. As in *Burger King,* the parties entered a freely negotiated agreement with future consequences and continuing legal obligations in the forum, and the agreements in like manner have choice-of-law provisions. Congruous with *World-Wide Volkswagen,* the execution and issuance of the securities and the default provisions under the terms of the agreement conclusively reinforce its deliberate affiliation with the forum and the foreseeability of litigation there. Moreover, like *The Bremen* and *Carnival Cruise Lines* cases, the agreement has a forum clause providing for jurisdiction in Washington, and the parties therefore cannot reasonably claim the element of surprise at being hailed to answer in Washington for defaults or breaches of the agreement.

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[7] Ninth Circuit decisions also provide a basis for concluding that SIMS is a party to the agreement. Under Washington law, the stock certificates that were signed by the President and Secretary of SIMS, on behalf of SIMS, and the issuance of SIMS Communications stock as required by the agreement, are "documents that relate to the same subject matter and that were executed as part of the same transaction," and collectively would be construed as an agreement or contract between SIMS, the respondents, and the plaintiffs. See *Parker v. BankAmerica Corp.,* 50 F.3d, at 763 (citing *Turner v. Wexler,* 14 Wn. App. 143, 146, 538 P.2d 877 (1975)). Moreover, the individual respondents were general agents of the corporation when the agreement was entered in September 1995, and the certificates were executed by them in representative capacities for the corporation. An agency relationship is material to jurisdiction, and consistent with these facts, satisfies the presence requirement and will subject a non-resident entity like SIMS to jurisdiction in Washington. See *Chan v. Society Expeditions, Inc.,* 39 F.3d, at 1405-07.

Despite the cogent grip of these jurisdictional facts, the decision held that specific jurisdiction is lacking because SIMS was not a party to the agreement. (App., 6a n.2). Beyond this, even if the decisions were deemed not necessarily to conflict with those cases, it nevertheless raises an important issue of federal constitutional law that should be resolved by this Court. While the above cases all bear on this issue, this Court has never decided a case raising the explicit question of the exercise of specific jurisdiction and application of a forum clause to a party like SIMS Communications in this case.

Finally, it should be stated that SIMS did not show in the state courts that other factors outweigh the purposeful contacts it established in Washington through the agreement. There was no showing, for example, that the litigation in Washington severely impairs its ability to call witnesses in support of its defenses. At the time of the agreement, SIMS was doing business nationally (at least 20 states, R. 386), and it is no less convenient for it to appear here than it is in these other states. Also, the respondents, as officers and directors of a public company, are clearly seasoned in business, were represented by Florida counsel throughout the negotiations consummating the agreement, and did not otherwise show how jurisdiction in Washington would be fundamentally unfair. The exercise of specific jurisdiction over SIMS in this case is constitutional, and does not offend due process.

III.

THE DECISION RAISES IMPORTANT QUESTIONS OF FEDERAL LAW, AND CONFLICTS WITH THE REASONING OF THIS COURT'S DUE PROCESS DECISIONS IN THE *RICHARDS, LOGAN, BELL*, AND *BODDIE* CASES

The constitutional issues under the Securities Act of 1933 are based on the Due Process Clause of the Fourteenth Amendment and the insular dismissal of these

claims contrary to due process considerations and this Court's holdings in a number of important cases. The decision of the Washington Court of Appeals affirming the dismissal of these claims is based on *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 991 P.2d 638 (1999), and the absence of argument on the claims. (App. 8a). The claims under the Securities Act of 1933, however, are based on Rule 144 and were extensively briefed in the appeal. (Court of Appeals October 2000 brief). The decision touches the arguments on Rule 144, but in the relevant respect, declines to address the issues noting that the latter argument was never before the trial court. (App., pp. 12a-13a). The status of this important claim is that it has been dismissed, when argument was presented on these issues.

"Many controversies have raged about . . . the Due Process Clause" but it is fundamental that "except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that involved here, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The inquiry under the Court's holding in *Mullane* is whether there has been a deprivation of a protected interest and, if so, what process is due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

In a number of this Court's cases, it has been held that a cause of action is a form of property protected by the Due Process Clause of the Fourteenth Amendment. *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996); *Logan*, 455 U.S., at 428. In *Mullane*, the Court held that a statute providing for notice by publication in a newspaper to trust beneficiaries, although sufficient for beneficiaries whose interests or addresses were unknown to the trustee, was not sufficient notice for known beneficiaries under the Due Process Clause because the effect of the statute was to

terminate "every right which beneficiaries would otherwise have against the trust company ... for improper management of the common trust fund." 339 U.S., at 311. The Court held that this had the effect of depriving trust beneficiaries of property because it "cut off their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.*, at 313. Similarly, in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), this Court held that a party's claim could not be dismissed for noncompliance with a discovery order, when the failure to comply with the order was due to inability, and not to willfulness, bad faith, or any fault of the party. This is because the Due Process Clause of the Fifth Amendment imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*, at 209-13.

The Court's holdings in *Mullane* and *Logan*, of course, have similarly interpreted the Due Process Clause of the Fourteenth Amendment. *Mullane,* 339 U.S., at 311-15; *Logan,* 455 U.S., at 433-37. In this framework, the Due Process Clause has been held to prevent the States from denying individuals the use of established adjudicatory procedures, when the denial would be the "equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Id.*, at 429-30; *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971). The rejection of these rights in this case shares the characteristics of these cases. In this respect, the right to established state procedures under the Securities Act of 1933 and Rule 144 is guaranteed by statute and court rules, and like a driver's license or an FEPA claim, is no less of an entitlement grounded in state (and federal) law. See *Bell,* 402 U.S., at 539; *Logan,* 455 U.S., at 431.

Rule 144 was adopted in 1972 under the Securities Act of 1933. Release No. 33-5223 (January 11, 1972) [37 Fed. Reg. 591]. When the rule is complied with, a safe harbor from liability exists under the registration

provisions of the Act for resales of restricted and control securities. Release No. 33-7390 (February 28, 1997) [62 Fed. Reg. 9242-43]. The rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by, or under common control with the issuer (*i.e.*, "affiliates").[8] Steinberg & Kempler, *The Application and Effectiveness of SEC Rule 144*, 49 Ohio State L. Rev. 473, 474 (1988) (citing Rule 144, 17 C.F.R. § 230.144 (1995)).

The merits of the claims under the 1933 Act and Rule 144 are substantial. Discovery preceding the motion for partial summary judgment bears out that the certificates issued under the agreement cannot be traced to a prior owner, and that their shares originated from SIMS, as opposed to shares owned or controlled by the respondents.[9]

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[8] An affiliate of an issuer is a person that directly or indirectly controls, or is controlled by, or is under common control with, such issuer. 17 C.F.R. § 230.144(a)(1) (1995). At the time of the agreement, the respondents' collective holdings in SIMS constituted 27% (approximately 1,836,346 or 9% each) of the outstanding stock of the company. (R. 989, 912-14). Respondents were clearly affiliates of SIMS and had control positions in the company when the shares were transferred under the agreement. (CP 996-97).

[9] Rule 144(d)(1) provides that restricted securities may be sold under the rule only if they have been beneficially owned for at least two years prior to the sale, and if the acquiror takes the securities by purchase, the two year period does not begin to run until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer. 17 C.F.R. § 230.144(d)(1) (1995).

In their depositions, the respondents in essence stated that none of the stock that was issued under the agreement came from them, that they didn't know who the stock came from (R. 952, 957-58), and that they weren't sure what shares were issued. (R. 942-46). In document requests with the depositions, respondents were asked to produce all documents showing that the shares were issued in accordance with Rule 144. (R. 960-69). The response was that Rule 144 was not implicated in the transactions under the agreement, and that no documents

(Continued on following page)

Even after lengthy discovery, the respondents cannot show where the shares came from or when the shares in SIMS were acquired they maintain were transferred under the agreement. The substantiality of the evidence standard described in *Logan*, 455 U.S., at 431, is comparable to a summary judgment standard where the burden on the moving party may be discharged by showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); Washington Civil Rule 56(c); *Honey v. Davis,* 131 Wn.2d 212, 217, 930 P.2d 908 (1997). The Court's holdings in *Martinez v. California,* 444 U.S. 277 (1980), and later in *Logan,* reflect that the burden of proof as an element in a summary judgment setting is an aspect of the property interest. See *Martinez,* 444 U.S., at 282 n.5; *Logan,* 455 U.S., at 433.

As the case presently stands, the pared dismissal of the 1933 Act as a theory of relief bars the assertion of these claims. That there can be no doubt about this mesmerizing conclusion is decisively reinforced by the denial of a motion for reconsideration on this very issue, in which a clarification was sought that the claims under the 1933 Act and Rule 144 remain viable in this case. (1/7/02 Motion for Reconsideration). The decision on this issue is in conflict with *Bell v. Burson, supra,* because it has eliminated consideration of liability factors from its decision contrary to due process. See 402 U.S., at 541. There is no paramount difference between the termination

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exist as to these requests. (R. 970-78). In discovery requests sent and answered months later (February and June 1999), the answers state that the shares were owned by the respondents prior to being transferred under the agreement, that the shares were acquired by them when the company was founded, and on documentation of prior ownership, no documents were identified or produced. (R. 990-95, 998-01).

of the cause of action here, and the causes of action in the *Richards, Logan* and *Bell* cases. The decision dismissing the basis for relief in the present case involves some of these same questions, but in a different context. The similarity is that in those cases, a wrongful deprivation of property occurred through an application of the law by the state courts which deprived a party of a claim or chose in action without the safeguards of due process. When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process. *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994). What the Fourteenth Amendment requires, as the Court has held in an important line of cases, is an opportunity granted at a meaningful time and in a meaningful manner, *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), for a hearing appropriate to the nature of the case. *Mullane,* 339 U.S., at 313; *Boddie v. Connecticut,* 401 U.S., at 378. This is the essential and constitutionally protected opportunity that has been denied by the dismissal of this important claim in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel For Petitioner

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

/s/ Susan R. Agid

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; PETER VETRANO and LENA VETRANO, husband and wife, Appellants, v. SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN N. MARKS and JANE DOE MARKS, individually and as a marital community; JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community, Respondents.	NO. 45616-4-1 DIVISION ONE Unpublished Opinion FILED: DEC 17 2001

COLEMAN, J. – Appellants Thomas Cacciola, Peter Vetrano, and their spouses come before this court on appeal from dismissal of their claims against respondents

SIMS Communications, Inc., and several named individuals. The appellants argue that the trial court: (1) abused its discretion by denying their discovery request for original deposition recordings; (2) erred by granting respondents' motion for summary judgment; and (3) erred by holding the appellants' attorney jointly liable for attorney fees and costs awarded to respondents. For the reasons set forth below, we affirm the trial court's dismissal of all but one of the appellants' claims. The portion of the trial court's order dismissing the appellants' state Securities Act claim is reversed and remanded for further proceedings consistent with this opinion. In addition, the trial court's order on the respondents' motion for fees and costs is reversed with directions to vacate or for entry of findings sufficient to support an award against the appellants' attorney.

FACTS

This case arises out of the alleged wrongful conduct of respondents SIMS Communications, Melvin Leiner, James Caprio, and Darren Marks with respect to a settlement agreement they entered into with appellants Thomas Cacciola and Peter Vetrano. Pursuant to the agreement, Leiner, Caprio, and Marks transferred 55,554 shares of their personally held restricted SIMS stock to the appellants (27,777 each) and paid them $17,500 in cash. At the time of the settlement agreement, Leiner, Caprio, and Marks were corporate officers and directors of SIMS. At that time, SIMS securities were traded on the NASDAQ (National Association of Securities Dealers Automated Quotation System). The agreement provided that it was to be enforced under Washington law and in the event of litigation, adjudicated in the state or federal courts in King County.

Approximately six months after the parties entered the settlement agreement, SIMS effected a 10 for 1 reverse split of its common stock. Approximately two years later, SIMS effected another reverse split, this time at a 4 for 1 ratio. As a result of these reverse splits, the appellants' holdings were reduced from 27,777 to 694. Over the course of these two and one-half years, the value of SIMS stock decreased significantly.

In September 1997, appellants filed suit against SIMS, Leiner, Caprio, and Marks alleging violations of the Securities Act of Washington, fraud, negligent misrepresentation, breach of fiduciary duty, violations of the Securities Act of 1933, violations of 18 U.S.C. sec. 1962 (Racketeer Influence and Corrupt Organizations Act (RICO)) and violations of Washington's Consumer Protection Act. After the appellants' claims were dismissed on respondents' summary judgment motion, appellants initiated this appeal.

DISCUSSION

1. Jurisdiction

One of the bases for the trial court's dismissal of the appellants' claims was its conclusion that it lacked personal jurisdiction over SIMS. Where the underlying facts are undisputed, the trial court's assertion of personal jurisdiction is a question of law reviewable de novo. *Lewis v. Bours,* 119 Wn.2d 667, 669, 835 P.2d 221 (1992). The party asserting jurisdiction has the burden of proof. *CTVC of Hawaii, Co. v. Shinawatra,* 82 Wn.App. 699, 708, 919 P.2d 1243 (1996).

Washington state courts may exercise either general or specific personal jurisdiction over a nonresident defendant.

RCW 4.28.080(10)[1] *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn.App. 414, 418, 804 P.2d 627 (1991); "General jurisdiction over a nonresident defendant is proper when the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state." *Raymond v. Robinson*, 104 Wn.App. 627, 633, 15 P.3d 697 (2001). Because the exercise of general jurisdiction turns upon the extent of the defendant's contacts with the forum state, jurisdiction must be determined on a case-by-case basis.

In Raymond, the defendant company had no offices or agents in Washington, but it advertised its products to Washington consumers through mailings and magazines, negotiated sales with Washington consumers over the phone and through the mail, authorized warranty repairs on its products in Washington, and sent technicians to service its products in Washington. *Raymond*, 104 Wn.App. at 633-34. The court concluded that the defendant's contacts were not substantial enough to justify the exercise of general jurisdiction.

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[1] RCW 4.28.080 sets forth the requirements for service of summonses in Washington and has been interpreted as the basis for general jurisdiction:

The summons shall be served by delivering a copy thereof, as follows:

. . . .

(10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent cashier or secretary thereof.

. . . .

Similarly, in *Banton v. Opryland, U.S.A., Inc.*, 53 Wn.App. 409, 767 P.2d 584 (1989), *overruled on other grounds, Shute v. Carnival Cruise Lines,* 113 Wash.2d 763, 783 P.2d 78 (1989), this court held that the defendant company's contacts with Washington were not sufficient to subject it to the general jurisdiction of the trial court. In Banton, the court noted that cases affirming the exercise of general jurisdiction "generally require extensive involvement by the corporation within Washington." *Banton,* 53 Wn.App. 416. There, a Washington resident was injured during a visit to defendant Opry's facilities in Nashville, Tennessee and filed a claim against Opry in Washington. Opry's contacts with Washington included promotional presentations, radio broadcasts, and commissions paid to Washington travel agents who booked trips to its Nashville facilities. The court concluded that these contacts did not suggest continuous involvement by Opry in Washington and were not enough to exercise general jurisdiction. *Banton,* 53 Wn.App. at 418.

By contrast, the court in *Hartley v. Am. Contract Bridge League,* 61 Wn.App. 600, 812 P.2d 109 (1991), held that the defendant bridge league had sufficient contacts with Washington to subject it to the general jurisdiction of the state courts. The court based its decision upon the "continuous and substantial" activities of the league, including organizing tournaments in Washington, selling and transporting bridge supplies in Washington, charging and collecting tournament fees from Washington residents, and determining which Washington residents could participate in the bridge tournaments. *Hartley,* 61 Wn.App. at 606.

In this case, it is undisputed that SIMS rented cellular telephones via automated dispensing machines at

several Alamo car rental outlets in Washington from January 1995 to May 1996. This 17-month rental operation, however, apparently defines the extent of SIMS's contact with Washington. The appellants have presented no evidence that SIMS had offices, employees, or agents in this state. The total amount of revenue gleaned from this venture was less than $12,000. Although these facts place this case somewhere between the factual scenarios in the cases discussed above, we conclude that SIMS's contacts with this state are not sufficient to support the exercise of general jurisdiction.[2] The trial court's dismissal of SIMS for lack of personal jurisdiction is affirmed.

2. Appellants' Discovery Request

A trial court's discovery ruling "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 778, 819 P.2d 370 (1991) (quoting *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). CR 26(b) dictates the scope and limits of discovery:

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[2] The appellants also argue that SIMS is subject to specific jurisdiction in Washington courts under the settlement agreement's choice of forum clause. Because SIMS was not a party to the agreement, however, the appellants' argument fails. Specific jurisdiction over the other individual respondents is proper. *See Kysar v. Lambert,* 76 Wn.App. 470, 484-85, 887 P.2d 431 (1995) (An agreement that shows consent to personal jurisdiction is to be respected unless enforcement would be unreasonable and unjust.).

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> The frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation[.]

The appellants moved the trial court for an order to obtain the original recordings from the depositions of Thomas Cacciola and Peter Vetrano. Appellants argued that they needed access to the original recordings "[f]or purposes of authenticity and any minor differences there may be between the original recordings and the transcribed versions[.]" Stating that the appellants had failed to show good cause for production of the original recordings, the trial court denied their motion.

The trial court did not abuse its discretion by denying the appellants' request for the original deposition recordings. Because the appellants already had access to the

deposition transcripts, their request for the recordings was duplicative. Furthermore, in light of the appellants' admitted purpose in seeking the recordings – i.e., to look for minor differences between the recordings and the transcripts – their request was unduly burdensome and unlikely to lead to information "relevant to the subject matter in the pending action[.]" CR 26(b)(1). We uphold the trial court's denial of the appellants' request for access to the deposition recordings.

3. Respondents' Motion for Summary Judgment

This court reviews orders of summary judgment de novo and engages in the same inquiry as the trial court, "treating all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party." *Enter. Leasing, Inc. v. City of Tacoma,* 139 Wn.2d 546, 551, 988 P.2d 961 (1999). Summary judgment should be granted when there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Kuhlman v. Thomas,* 78 Wn.App. 115, 119, 897 P.2d 365 (1995).

The appellants assign error to the trial court's dismissal of their claims against SIMS and the named individual defendants. A substantial impediment to their success on appeal, however, is posed by their complete failure to present argument on all but one of their claims. *See Litho Color, Inc. v. Pac. Employers Ins. Co.,* 98 Wn.App. 286, 297, 991 P.2d 638 (1999) ("An argument will not be considered if it is inadequately briefed."). Appellants have complied with RAP 10.3(a)(3) by assigning error generally to the trial court's grant of summary judgment for respondents. Apparently, appellants intend

this sweeping assignment of error to be read to imply particularized allegations of error as to each of their claims. The appellants have failed, however, to proffer any argument on all but one of their claims. Accordingly, we affirm the dismissal of appellants' claims for fraud, negligent misrepresentation, breach of fiduciary duty, violation of Securities Act of 1933, violation of 18 U.S.C. sec. 1962 (RICO), and violation of the Washington Consumer Protection Act.

A. Violation of Title 21 RCW: Securities Act of Washington

Appellants claim that respondents Leiner, Marks, and Caprio violated the Securities Act of Washington in the transfer of SIMS securities under the settlement agreement. Specifically, appellants argue that respondents violated RCW 21.20.010:

> **Unlawful offers, sales, purchases.** It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

> (3) To engage in any act practice, or course of business which operates or would operate as a fraud or deceit upon any person.[3]

Appellants assert that the respondents failed to disclose material facts regarding the true financial status of SIMS at the time of the settlement agreement. While neither Cacciola nor Vetrano have any personal knowledge of the facts surrounding the negotiation of the settlement agreement, their attorney, [appellant's counsel], acted as their agent[4] and filed a declaration on his clients' behalf. In his declaration, [appellant's counsel] stated that he was never informed "about SIMS' losses or that it was not profitable prior to, contemporaneously with, or subsequent to the settlement agreement" and that his discussions with respondents' attorney "never addressed or touched on the subject of SIMS' financial condition and its losses, or its recurring history of losses at that time." [appellant's counsel] also stated that after the settlement agreement was signed, he asked respondents for financial documents about the SIMS company but was told that they were being prepared but were not yet available.

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[3] The terms 'sale' and 'sell' are defined to include 'every contract of sale of, contract to sell, or disposition of, a security interest in a security for value. . . .' RCW 21.20.005(10).

[4] "Representations made to a third person with the intent that they be shown or communicated to the complainant may properly be relied on by the latter[.]" 37 C.J.S. Fraud sec. 46 (1997) (footnote omitted). *See also, Joseph v. Norman LaPorte Realty, Inc.*, 508 So. 2d 496, 497 (Fla. App. 3d Dist. 1987) (The fact that alleged fraudulent misprepresentations were made to plaintiffs' agent cannot negate the element of reliance when the agent relied on the defendant's mispresentations and the plaintiffs in turn relied on their agent's report.).

Respondents' main argument in response to appellants' Securities Act claim is that Cacciola and Vetrano lack personal knowledge regarding the settlement agreement. Respondents dismiss the argument regarding [appellant's counsel] involvement as appellants' agent by suggesting that he was informed of SIMS's true financial status but withheld that information from his clients. As support for their position, respondents point to a letter from respondent Leiner to his attorney requesting changes to the proposed settlement agreement. Most importantly, in that letter Leiner requests that the agreement be changed to reflect the fact that SIMS was not profitable. In his declaration filed in support of respondents' motion for summary judgment, counsel for respondents stated that he specifically discussed this change with [appellant's counsel] and that [appellant's counsel] complied with Leiner's request by removing language in the agreement referencing the company's profitability. In response, [appellant's counsel] argues that he was never made aware of the proposed change and points out that the letter from Leiner was dated the day *after* appellants signed the settlement agreement.

These contrasting accounts of the events surrounding the settlement agreement expose the existence of a disputed issue of material fact: Did respondents withhold information from the appellants pertaining to the financial status of SIMS at the time of the settlement agreement? This issue constitutes the backbone of appellants' Securities Act claim – i.e., an omission of a material fact.[5] In light

[5] A fact is considered "material" if it consists of information to which a reasonable person would attach importance in determining his choice of action in a given transaction. *Clausing v. DeHart*, 83 Wn.2d

(Continued on following page)

of this disputed issue of fact, the trial court's dismissal of appellants' Securities Act claim is reversed.

B. Securities & Exchange Commission (SEC) Rule 144

The appellants moved the trial court for partial summary judgment under SEC Rule 144. Due to changes in the case schedule, the motion was stricken and set to be renoted at a later date. Before the appellants' summary judgment motion was renoted, however, the trial court granted summary judgment for the respondents and dismissed all of the appellants' claims. In its order denying the appellants' motion for reconsideration, the trial court stated that their motion for partial summary judgment was made moot by the intervening order dismissing their claims.

On appeal, the appellants have attempted to resurrect their argument regarding respondents' alleged violation of SEC Rule 144 by assigning error to the trial court's "failing to grant plaintiff's motion for partial summary judgment . . . and [its] ruling that the motion was mooted by the grant of summary judgment in the defendants' favor." Brief of Appellants, at 1. But as the respondents are quick to point out, the appellants' argument regarding SEC Rule 144 is not properly before this court.

70, 515 P.2d 982 (1973). Appellants have stated that they would not have accepted SIMS securities in the settlement agreement if they had known that SIMS was not profitable. *See* Deposition of Cacciola, at Clerk's Papers 1447-48.

The appellants' argument regarding respondents' alleged violation of SEC Rule 144 was not before the trial court in its consideration of respondents' motion for summary judgment. Rather, it was first raised in the appellants' motion for partial summary judgment – which was not noted on the trial court's calendar until *after* the court had granted summary judgment for the respondents. Moreover, the appellants' motion for partial summary judgment was explicitly rejected by the trial court as moot because all of their claims had already been dismissed. Thus, because the appellants' SEC Rule 144 argument was never actually before the trial court, we decline to address it on appeal. *See* RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. . . . ").

5. Attorney Fees

In general, attorney fees are not recoverable by the prevailing party absent a contract, statute, or recognized ground of equity. *Hillis v. Dept. of Ecology,* 131 Wn.2d 373, 401, 932 P.2d 139 (1997). In addition, CR 11[6] and a court's inherent equitable powers authorize the award of attorney fees in cases of bad faith. *In Re Recall of Pearsall-Stipek,* 136 Wn.2d 255, 267, 961 P.2d 343 (1998). An award of attorney fees is left to the trial court's discretion and will not be disturbed absent a clear showing of abuse. *Fluke*

[6] CR 11 authorizes the imposition of sanctions against a party or attorney for filing pleadings or motions that are not grounded in fact or law. *Biggs v. Vail,* 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

Capital & Mgmt. Servs. Co. v. Richmond, 106 Wn.2d 614, 625, 724 P.2d 356 (1986).

In this case, when the trial court entered its order on respondents' motion for summary judgment, it reserved its ruling on attorney fees. The court also crossed out language in the order relating to imposition of CR 11 sanctions against the appellants' attorney and, instead, noted that "[c]ounsel's arguments did not prevail but were not frivolous; however, counsel is warned that if this case were to go further, he would be an essential witness, might have a conflict of interest, and should consider advising his clients to obtain separate counsel." Approximately two months later, the trial court ordered that "defendants are awarded a judgment against the plaintiffs and/or their attorney of record, John Keefe, in the sum of $47,865.90."

Respondents argue that the trial court properly imposed attorney fees against appellants' counsel for bad faith. In light of the trial court's explicit rejection of CR 11 as a basis for sanctions against appellants' counsel, however, the award is seemingly baseless. The trial court's order on respondents' motion for fees and costs is remanded with instructions to vacate or for entry of findings sufficient to support an award against appellants' attorney.

Dismissal of appellants' fraud, negligent misrepresentation, breach of fiduciary duty, Securities Act of 1933, 18 U.S.C. sec. 1962 (RICO), and Washington Consumer Protection Act claims is affirmed. The portion of the trial court's order dismissing appellants' state Securities Act claim is reversed and remanded for further proceedings consistent with this opinion. The trial court's order on the respondents' motion for fees and costs is reversed with

directions to vacate or for entry of findings sufficient to support an award against appellants' attorney.

/s/ Coleman, J

WE CONCUR:

/s/ Kennedy J

/s/ Becker, A. C.J.

THE SUPREME COURT
STATE OF WASHINGTON
[SEAL]

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Re: Supreme Court No. 72288-9 – Thomas & Marlene Cacciola, et al. v. Sims Com., Inc., et al. Court of Appeals No. 45616-4-1

Clerk & Counsel:

This will acknowledge receipt on September 20, 2002, of the Petitioners' "MOTION FOR RECONSIDERATION."

The pleading seeks reconsideration of this Court's September 4, 2002 order denying the petition for review.[1]

A denial of a petition for review is not subject to reconsideration. The RULES OF APPELLATE PROCEDURE (RAP) provide that a party may file a motion for reconsideration only of "a decision terminating review", see RAP 12.4(a). One element of "a decision terminating review" is that it must be an opinion, order or judgment of the appellate court filed *after* review is accepted, see RAP 12.3(a). A denial of a petition for review is an act declining to accept review. As such, the Court's decision on the petition for review is not subject to reconsideration.

Accordingly, although the pleading has been placed in the closed file, this court can take no further action on it.

Sincerely,

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Supreme Court Deputy Clerk

RRC:jaa

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[1] It is noted that the Department of the Court which denied the petition for review was comprised of five of the nine Justices of this Court, a majority of the Court.

THE SUPREME COURT OF WASHINGTON

THOMAS A. CACCIOLA and MARLENE CACCIOLA, husband and wife; PETER VETRANO and LENA VETRANO, husband and wife. Petitioners, v. SIMS COMMUNICATIONS, INC., a Delaware corporation; MELVIN LEINER and JANE DOE LEINER, individually and as a marital community; DARREN M. MARKS and JANE DOE MARKS, individually and as a marital community; and JAMES J. CAPRIO and JANE DOE CAPRIO, individually and as a marital community, Respondents.	NO. 72288-9 **ORDER** C/A NO. 45616-4-I (Filed Sep. 4, 2002)

Department I of the Court (composed of Chief Justice Alexander and Justices Smith, Madsen, Ireland and Chambers) considered this matter at its September 4, 2002, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4th day of September, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE